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In the

Supreme Court of the United States

October Term, 1975

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION AFL-CIO
AND
MARITIME LOCAL NO. 8-801 OF
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION AFL-CIO,
Petitioners,

v.

MOBIL OIL CORPORATION,
MARINE TRANSPORTATION DEPARTMENT,
GULF-EAST COAST OPERATIONS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A)[1] is reported at 504 F.2d 272. The opinion of the three-judge panel of the court of appeals (Pet. App. B) is reported at 483 F.2d 602. The district court's findings of fact, conclusions of law and judgment (Pet. App. D) are reported at 81 LRRM 2051 and at 1972 A.M.C. 1712.

[1] References designated "Pet. App. ....., p. ....." are to pages in the appendices to the Petition for a Writ of Certiorari. References designated "A. ....." are to pages in the printed Single Appendix. References designated "Pet. ....." are to pages in the Petition for a Writ of Certiorari. References designated "Pet. Br. ....." are to pages in Petitioners' brief. References designated "Sol. Gen. Br. ....." are to pages in the *amicus curiae* brief filed on behalf of the United States in this case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether Texas has a sufficient interest in the employment relationship between Respondent and the employees in its tanker fleet, headquartered at Beaumont, Texas, so that under Section 14(b) of the National Labor Relations Act, as amended, the Texas right-to-work law applies to an agency shop clause in a collective bargaining agreement covering such employees.[2]

STATUTES INVOLVED

The pertinent statutory provisions are cited and set forth in the Petition for a Writ of Certiorari (Pet. App. C).

STATEMENT

On September 16, 1971, a complaint was filed on behalf of Respondent, Mobil Oil Corporation, Marine Transportation Department, Gulf-East Coast Operations (hereinafter "Respondent")[3] against petitioner unions, Oil, Chemical and Atomic Workers International Union AFL-CIO and its Maritime Local No. 8-801 (hereinafter "Petitioners") in the United States District Court for the Eastern District of Texas, Beaumont Division (A. 6). The complaint sought a declaratory judgment that an agency shop clause[4] in the collective bargaining agreement between Respondent and Petitioners (hereinafter "Agreement") violated the Texas right-to-work law (Pet. App. A, p. 2). After a full evidentiary hearing, the district court concluded that, pursuant to section 14(b) of the National Labor Relations Act, as amended (hereinafter "Act"), the Texas law applied to the parties' employment relationship and rendered the agency shop provision invalid (*Id.*).

On August 10, 1973, a panel of the court of appeals (by a 2-1 vote) reversed the district court's judgment (Pet. App. B, p. 13). After rehearing *en banc*, the judgment of the district court was affirmed (by an 8-6 vote) on November 8, 1974 (Pet. App. A, p. 22).

I. The Facts

Respondent operates 8 oceangoing tankers which primarily move between Texas ports and ports on the United

[2] In the Petition for a Writ of Certiorari a second issue involving deferral of this proceeding to the National Labor Relations Board (hereinafter "NLRB") was presented (Pet. 2). Although the Court granted certiorari without restriction, Petitioners have since abandoned this issue (Pet. Br. 2). This issue of deferral is, therefore, inapropriate for consideration by the Court. Moreover, the Solicitor General has recognized that such deferral is not required. See Sol. Gen. Br. at 23-24. For Respondent's argument with respect to the correctness of the *en banc* court's holding as to the inappropriateness of deferral, see Respondent's brief in opposition to the Petition for a Writ of Certiorari at 11-12.

[3] Contrary to the labor agreement's designation of the contracting parties, Petitioners have erroneously denominated Respondent as "Mobil Oil Corporation" in their Petition for a Writ of Certiorari and in their brief on the merits. This misnomer appears to be a deliberate effort to obscure the Texas seat of Respondent's operations. There is no question that Respondent is an operating unit of Mobil Oil Corporation conducting its business from Beaumont, Texas. At all stages of the proceedings before the district court, Respondent was correctly identified by Petitioners.

[4] For purposes of permitted state prohibitions under Section 14(b), an agency shop clause can be regarded as the substantial equivalent to a union shop clause since this Court in *Retail Clerks International Assn. v. Schermerhorn*, 373 U.S. 746 (1963), held that each of these clauses can be prohibited pursuant to Section 14(b), and the Attorney General of the State of Texas has declared each of these clauses to be violative of Texas right-to-work law. See pp. 7-8 *infra*. An agency shop clause requires all employees, whether or not union members, to pay union initiation fees and union dues within a specified time after employment and to continue paying dues. A union shop clause requires all employees to become union members within a specified time and to remain so. In either case the employee is subject to discharge if the employee does not comply.

States east coast (A. 117).[5] Petitioners are the collective bargaining representative for the unlicensed seafaring employees who work on these tankers (Pet. App. B, p. 5).

Since April 1, 1962, Respondent's headquarters have been located in Beaumont, Texas (A. 109; Pet. App. A, p. 3). All Respondent's personnel are supervised, controlled and instructed by its manager or his staff in Beaumont (A. 55-60). Similarly, all budgeting, expenditures, maintenance and supply requests for Respondent's tanker operations are processed in Beaumont (A. 57). Respondent's manager who controls its entire operations, its marine superintendent who directs the ship masters, its personnel director who is responsible for employee relations, its port steward who handles the provisioning of tankers, its port engineer who supervises the maintenance and repair of tankers, its administrative supervisor who is responsible for budgeting and supply expenditures, and other office staff all live and work in Beaumont, Texas (A. 54-60).

[5] Inspection of a map will reveal that the Texas ports at which these tankers dock (Beaumont, Houston, Corpus Christi, and Brownsville) are all inland ports that can be reached only through travel along inland rivers and channels in the State of Texas. The following chart demonstrates the round-trip distance and travel time between each of these ports and the Gulf of Mexico:

Port	Distance (miles)	Time (hours)	Pilot Pickup
Beaumont	84	12	Sabine Bar
Houston	117	12	Galveston Bar Sea Buoy
Corpus Christi	50	6	Aransas Pass Sea Buoy
Brownsville	34	6	Brazos Santiago Sea Buoy

Because of the geographical characteristics of these Texas ports, Respondent's seafaring employees do spend a significant portion of their work time within the State of Texas. To this time must be added the substantial additional time the tankers are tied up at dockside, when the employees are also performing work under the Agreement. The importance of this aspect of their employment relationship with Respondent becomes apparent in subsequent discussion of the Solicitor General's erroneous statement that these employees perform no work within the State of Texas. See pp. 29-31 *infra*.

From its headquarters in Beaumont where these fleet support operations are centered, Respondent administers the Agreement with the Petitioners (Pet. App. D, p. 4). Petitioner local union also maintains a permanent office in Beaumont, Texas (A. 92). The local union president is a resident citizen of Houston, Texas and the local union vice-president is a resident citizen of San Augustine, Texas; both work at the Beaumont union office (A. 92, 192).

All grievances filed pursuant to the Agreement that are not settled through lower level, informal conferences, are submitted to and considered by Respondent's manager at Beaumont, and either approved, rejected or compromised through direct dealings with Petitioners in Beaumont (A. 95-98; Pet. App. D, p. 3).[6] Furthermore, all monthly checkoffs of union dues required by the Agreement are computed, deducted from pay, and forwarded to Petitioners from Texas (A. 158-161; Pet. App. D, p. 3). Respondent's manager is frequently and routinely in conference with the Petitioners' officials at Beaumont during which time the Agreement is reviewed and interpreted (A. 98-99). When Petitioners believed Respondent had committed an unfair labor practice in 1969 with reference to vacation benefits, a charge filed by Petitioners with the regional office of the NLRB in Houston, Texas named Beaumont as Respondent's headquarters (Pl. Ex. 7, A. 236).

Respondent's entire personnel records are maintained at its Beaumont headquarters (A. 59, 74; Pet. App. A, p. 3; Pet. App. D, p. 3). Wages are paid primarily by payroll check, but partly in cash. All payroll checks are written in and mailed from Texas (A. 65-69; Pet. App. A, p. 3), and all cash handed to employees aboard ship is placed on

[6] This is the most important of all grievance steps for if the dispute is not settled at this level, the matter is submitted to arbitration. In fact, of some 20 grievances considered at this level, 16 were settled by Respondent's manager in Beaumont (A. 96; 140-141).

board in Texas (Pet. App. D, p. 3).[7] Federal income and social security taxes withheld from personnel employed on Respondent's tankers are remitted from Texas to an Internal Revenue Service office in Texas (A. 68; Pet. App. D, p. 3). Texas is, moreover, the only state collecting unemployment compensation insurance premiums on all personnel employed aboard Respondent's tankers; Texas does so regardless of the designation of home address or shipping port (A. 93; Pet. App. D, p. 2).

All of the 289 seafaring employees employed by Respondent are headquartered in Beaumont (A. 63; Pet. App. D, p. 2), and 152 of them have requested Respondent to list Beaumont, Texas, as their shipping port (A. 64; Pet. App. D, p. 3).[8] Furthermore, 123 of such employees have reported to Respondent that Texas is their state of residence (A. 63; Pet. App. D, pp. 2-3). Sixty percent of all applicants for employment make their initial applications in Texas and all final employment decisions are made at Respondent's Beaumont headquarters (A. 75-76; Pet. App. A, p. 4; Pet. App. D, p. 3). Similarly, all final decisions to terminate employees

[7] The pay of all seafaring employees consists of "allotment" checks mailed from the State of Texas to the designated dependents of such employees, "vacation" checks sent to such employees from Beaumont, and cash carried aboard ship at Beaumont and handed to such employees (A. 65-69). During a representative year, 1971, approximately $5,907,000.00 in pay was disbursed by Respondent as follows: $1,907,000.00 in cash was carried aboard ship at Beaumont for subsequent payment; $1,365,000.00 in vacation checks were prepared at and mailed from Respondent's headquarters in Beaumont; $1,117,000.00 in allotment checks were prepared in and sent from Texas as requested; and $1,431,000.00 in federal income tax and FICA deductions were computed and paid in Texas (Pl. Ex. 3; A. 238). *Thus, out of each $6.00 in wages paid by Respondent, $4.00 changes hands in the State of Texas.* During the same representative period only $69,700.00 was paid from the New York offices of Respondent — a figure which is less than 1.2% of the amounts actually distributed from the State of Texas (A. 69-71). This small amount included standby pay handled by a branch office that is staffed by 3 people and directed by Respondent's manager in Beaumont as an adjunct to his office.

[8] Petitioners indicated that 197 unlicensed employees have designated New York as their shipping port (Pet. Br. 5). This number should read 107 (A. 64, 237). Texas counsel for Petitioners has orally agreed to make an appropriate correction.

are made in Beaumont, with the actual termination being carried out solely in Texas (Pl. Ex. 6, A. 259; A. 76-77; Pet. App. A, p. 4).[9]

All seafaring employees on Respondent's tankers are regularly present in Texas since Respondent's tankers in their normal trade either begin or end voyages at Texas ports, or travel between Texas ports (A. 115; Pet. App. D, pp. 3-4). At all times many of Respondent's seafaring employees are present in Texas, either on board Respondent's tankers or on paid vacation or shore leave time (Pet. App. D, p. 4).[10] All of Respondent's seafaring employees spend 10 to 20 percent of their work time in Texas (Pet. App. D, p. 7).

Respondent's periodic employee newsletter, entitled *Mobil Mariner*, is datelined, written, edited, printed, published, and mailed from Beaumont (Pl. Ex. 5, A. 275). Similarly, Respondent issues to newly employed seamen a booklet entitled WELCOME ABOARD!, written and published in Texas and which recites that the mailing address of such employees will be "John Doe, S/S 'Name of Ship', Mobil Oil Corporation, Gulf-East Coast Operations, P. O. Box 3444, Beaumont, Texas 77704" (Pl. Ex. 4, A. 247).

II. The Agreement and Texas Law

Respondent and Petitioners were parties to an Agreement (Pl. Ex. 1, A. 279-329) negotiated and initially executed

[9] While the masters of Respondent's ships can remove seamen from their ships and put these men ashore at any port, Respondent's manager can reassign these seamen to other ships in Respondent's fleet *since only the manager acting in Texas has the authority to discharge seamen from Respondent's employ* (A. 195, testimony of local union officer).

[10] Respondent's unlicensed employees work a 120-day cycle consisting of approximately 90 days aboard ship and approximately 30 days ashore on vacation/paid leave; however, during such vacation/paid leave time, the payment of wages continues and such personnel remain employees of Respondent (A. 66-67).

in New York but prepared in final form and re-executed in Texas (A. 105-109; Pet. App. A, p. 4 n. 3),[11] containing the following agency shop clause (A. 281; Pet. App. B, p. 4):

> 2. UNION SECURITY
>
> b. For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within thirty-one days from the employment date.

During the term of the Agreement, Respondent learned that the Attorney General of Texas had determined "* * * that the 'Agency Shop' clause in a contract between a labor union and management contravenes and is in violation" of Texas law. See Tex. Att'y Gen. Op. No. WW-1018 (1961) (Pl. Ex. 8, A. 261-67). See also Vernon's Tex. Rev. Civ. Stat. Ann. Art. 5154a, § 8a, Art. 5154g, § 1, Art. 5207a, § 2 (1971) (Pet. App. C, p. 2).[12] Respondent accordingly informed Petitioners that the agency shop clause of the Agreement was illegal, and sought to conform the Agreement to Texas law by deleting this clause (Pet. App. A, p. 2).

Petitioners rejected Respondent's request to conform the Agreement and, instead, advised all covered employees that failure to make payment of regular dues and fees would result in termination (Pl. Ex. 10, A. 270-71). Respondent thereupon filed this action seeking a declaratory judgment that the agency shop clause violated Texas right-to-work law.[13]

[11] The Agreement does not contain a choice-of-law provision (Pet. App. A, p. 4 n. 3).

[12] It was conceded by Petitioners in the court of appeals (during oral argument before the 3 judge panel) and recognized by the district court and all participating circuit judges, that the Texas right-to-work law prohibits agency shop clauses. This conclusion is not now challenged by either Petitioners or the Solicitor General.

[13] While Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), of the Act permits union security agreements within certain limits, Section 14(b), 29 U.S.C. § 164(b) (1970), of the Act allows state right-to-work laws which prohibit such agreements. Section 14(b) provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

III. The District Court Proceedings

After a two-day trial, the district court made findings of fact as to the nature and extent of Respondent's contacts with Texas (Pet. App. D, pp. 1-5). In its conclusions of law, the district court held that "[t]he application * * * of the agency shop clause (Article I, ¶2b) of the collective bargaining agreement to any or all of Plaintiff's operations and employees contravenes the Texas right-to-work statutes (citations omitted)", and thus "[t]he agency shop clause * * * is void and unenforceable" (Pet. App. D, pp. 6-7).

IV. The Court of Appeals Proceedings

A divided panel of the court of appeals reversed, stating that the district court " * * * failed to give proper consideration to the most important factor in the case, that is, the situs of the work performance of the covered employees" (Pet. App. B, p. 11).

On rehearing *en banc*, the panel decision was overruled and that of the district court affirmed. In its opinion, the *en banc* court noted that the parties, the district court, and the panel had analyzed the employment relationship between Respondent and its seafaring employees in terms of its contacts with Texas and other jurisdictions and that all had concluded that the contacts with Texas "* * * far outweigh[ed] contacts with any other *state* * * *" (Pet. App. A, p. 3; emphasis in original).[14] The *en banc* court then explained that, while the panel had found that job situs was "* * * the determinative factor in deciding whether the Texas law is applicable * * *", it considered the approach of the panel too "limited" and instead chose "* * * to weigh all of the contacts in the context of our national labor policy" (Pet. App. A, p. 5).

[14] In fact, the *en banc* court stated that the record evidence suggested that "from the seaman's first encounter with the company to his last, the Beaumont headquarters is constantly in the picture" (Pet. App. A, p. 4).

In its examination of the issue before it,[15] the *en banc* court utilized a "multi-dimensional" analysis: (1) it examined this employment relationship in terms of its contacts with Texas and other jurisdictions; (2) it studied the language and legislative history underlying the Taft-Hartley Act and the 1951 amendment to the Railway Labor Act; and (3) it scrutinized the relative interests of Texas and other jurisdictions in applying their laws to this employment relationship (Pet. App. A, p. 21). On the basis of this analysis, the *en banc* court concluded that the contacts between *this* employment relationship and Texas predominate over those of any other state and thereby give Texas a significant interest in applying its right-to-work law (Pet. App. A, pp. 7-8). Moreover, the *en banc* court found that national policy would be fostered by allowing Texas to apply its right-to-work law to this employment relationship (Pet. App. A, pp. 7, 17).

There were two dissenting opinions. The dissent on the merits, like the majority opinion of the panel, would have accorded job situs conclusive weight (Pet. App. A, pp. 22-31). The second dissenting opinion urged deferral of this

[15] The *en banc* court articulated the issue as follows:

> Whether the agency shop clause in this collective bargaining agreement is valid or not depends entirely upon whether the Texas right-to-work law applies to this employment relationship. In determining whether the Texas law is applicable, we must decide whether it was the intent of Congress in writing section 14(b) to permit a state to apply its right-to-work law to an employment relationship which has contacts with the state as described by the evidence presented to the district court. (Pet. App. A, p. 6; footnote omitted).

At earlier stages of these proceedings, Petitioners also urged as a separate issue that no actual case or controversy existed between Petitioners and Respondent as to the agency shop clause in the Agreement because the Agreement was soon to expire after institution of suit. The district court and all participating circuit judges rejected this contention. Moreover, due to the continuing relationship between Petitioners and Respondent and the likelihood of recurrence of the present dispute in the absence of final resolution, the conclusion of the courts below is clearly correct. See *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), wherein this Court held that continuity of relationship and probability of recurrence are sufficient to dispel doubts as to mootness.

action to the NLRB (Pet. App. A, pp. 31-36), a point not now in issue.

SUMMARY OF ARGUMENT

The fundamental inquiry in this case is whether Section 14(b) of the Act authorizes application of Texas right-to-work law to the agency shop clause covering Respondent's seafaring employees. Both the language of Section 14(b) of the Act and its underlying legislative history clearly establish that the concern of Congress was with the effect of union security agreements on the entire employment relationship between employer and employee — not merely with the place where the employee may be performing work at any given moment. Therefore, whether a state under Section 14(b) may ban a union security device such as the agency shop clause, is to be determined by looking to the sufficiency of a state's interest in applying its law to the whole employment relationship.

The language of Section 14(b) evidences that the concern of Congress was not narrowly limited. Section 14(b) sanctions the application of state right-to-work legislation "* * * to agreements requiring membership in a labor organization as a condition of employment in any State * * * in which such *execution or application* is prohibited by State * * * law." (emphasis added) While Section 8(a)(3) of the Act declared the closed shop illegal, this section did permit other types of union security devices (such as the union shop and the agency shop clause involved in this case). These forms of permissible union security arrangements are given effect for the duration of the covered employment relationship. Those persons unwilling to conform simply cannot retain a job. Union fees and dues are paid throughout the employment relationship under any union security clause, and employees who decline to make the required payments are subject to discharge at any time.

Aware of these facts, Congress broadly authorized states in which union security clauses are to be *executed* or *applied* to develop and apply their own policy. The legislative history underlying Section 14(b) supports this interpretation.

It shows conclusively that Congress was concerned with the impact of union security clauses on the entire employment relationship — that is, not only on hiring and termination, but also on the course of such relationship.

Looking to the whole employment relationship in this case, it is clear that Texas, as the court of appeals sitting *en banc* held, has a sufficient interest in applying its right-to-work law to the agency shop clause. Indeed, it has not been asserted that any state other than Texas has a sufficient interest in this employment relationship.

Contrary to the suggestion of Petitioners and the Solicitor General as *amicus curiae*, looking to the whole employment relationship will not result in extraterritorial application of Texas law, because any state with a greater interest in this employment relationship would apply *its* law. Nor will uncertainty result in any but the rarest of cases. And manipulation cannot be expected to result from looking to the entire employment relationship because union security clauses involve no costs to the employer, and remedies are available under the Act against any employer who relocates to escape a union.

Petitioners and the Solicitor General have urged that the sole determining factor in assessing the sufficiency of a state's interest under Section 14(b) is job situs, thereby seeking for workers on the high seas immunity from the application of *any* state law. This would result in judicial creation of an exception to Section 14(b) for seafaring employees, usurping the role of Congress. When Congress desired to prohibit the application of state right-to-work laws in the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970), it did so expressly. And when it desired to exempt specific industries (such as the construction, apparel and clothing industries) from a portion of the Act, it did so by explicit statutory provision. See Section 8(e) of the Act, 29 U.S.C. § 158(e) (1970). But Congress has not seen fit to create a special exemption for seafaring employees.

The Solicitor General agrees that the traditional legal status accorded to seamen does not require the creation of

an exception to Section 14(b). The Taft-Hartley Act, and the law developed under this act with regard to collective bargaining agreements governing many aspects of a seaman's employment relationship, have been applied without exception by both Congress and the courts to maritime employees. The assertion that Section 8(a) (3) of the Act alone applies to union security clauses is contrary to Congress' clear direction that state laws apply and would prefer the rule stated in Section 8(a) (3) to state right-to-work laws.

Further, the job situs test proposed by Petitioners and the Solicitor General on the basis of the 3 old decisions of the NLRB is not supported by those decisions. In each of those cases, the NLRB looked to the entire employment relationship and not to job situs alone. If, as the Solicitor General argues, "a State has a sufficient interest in applying its policies only if the employee performs *some* work within the State" (Sol. Gen. Br. 15), then the Texas right-to-work law applies in this case. The district court found that Respondent's seafaring employees perform 10 to 20 percent of their work in the State of Texas.

ARGUMENT

I. Section 14(b) of the Act authorizes application of the right-to-work law of the State of Texas to the employment relationship in this case.

A. The law of that State with sufficient interest in the employment relationship is to be applied under Section 14(b).

Sections 8(a) (3) and 14(b) of the Act, 29 U.S.C. §§ 158(a) (3) and 164(b) (1970), added by the Taft-Hartley Act of 1947 , were designed by Congress to remedy the abuses it perceived in compulsory unionism. S. Rep. No. 105, 80th Cong., 1st Sess. 5-7 (1947). These sections *together* comprise the remedy adopted by Congress. In Section 8(a) (3), while Congress prohibited the closed shop, it also authorized the union shop and agency shop — that is, Congress provided that union membership or dues in lieu thereof could be required as a condition of employment thirty days

after hire. In Section 14(b), however, Congress empowered[16] the states to adopt a more far-reaching solution to the problem of compulsory unionism by outlawing not only the closed shop, but the union shop and other forms of mandatory union membership as well. Section 14(b) provides:

> Nothing in this subchapter shall be construed as authorizing the *execution or application of agreements* requiring membership in a labor organization as a condition of employment in any State or Territory in which such *execution or application* is prohibited by State or Territorial law. (emphasis added)

The Texas right-to-work law is an exercise of that power.

In authorizing the application of state right-to-work laws in Section 14(b), Congress intended that each state develop its own policy with respect to the execution and application of union security arrangements such as the agency shop clause.[17] As a consequence, in determining whether Section 14(b) authorizes the application of a state right-to-work law, the touchstone must be whether the state has a sufficient interest in applying its policy to the employment relationship involved.

[16] This was indisputably a valid exercise of the power of Congress under the Commerce Clause [Art. I, Sec. 8, Cl. 3] of the Constitution of the United States. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). As decided in the leading case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851), Congress has plenary power to enact laws regulating commerce but the states have inherent power to enact laws regulating maritime or other commerce if such state laws cover a local matter not requiring a single uniform rule nationally applied and such state laws are not in conflict with laws enacted by Congress. Cf. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

[17] This Court held in *Retail Clerks International Assn. v. Schermerhorn*, 373 U.S. 746 (1963), that Section 14(b) allowed the states to prohibit agency shop clauses. Thus, as previously noted, for purposes of Section 14(b) and permitted state prohibitions on union security devices, the agency shop and the union shop can be treated as substantially equivalent.

B. The sufficiency of a state's interest in applying its law is to be determined by looking to the whole employment relationship.

Contrary to the argument of Petitioners and the Solicitor General, no single factor can be conclusive as to whether a state has a sufficient interest in an employment relationship to justify application of its right-to-work law. Rather, as the *en banc* court held, the sufficiency of a state's interest is to be determined by looking to the whole of the employment relationship. This approach is mandated both by the language of Section 14(b) and its underlying legislative history.

1. The language of Section 14(b).

Section 14(b) permits the states to prohibit "* * * the execution or application of agreements requiring membership in a labor organization as a condition of employment." Thus, the focus of Section 14(b) is on the *application* of such agreements, and not on any single event or incident of the employment relationship.[18]

Obviously, a contract provision requiring union membership or the payment of union dues in lieu thereof as a condition of employment must receive its *application* throughout the duration of the employment relationship. While Section 8(a)(3) provides that union membership cannot be required as a condition of employment until 30 days after hire, union security agreements continue to play a substantial part in the hiring process by foreclosing employment of persons who are unwilling to abide by them after that brief

[18] Prior versions of the bill that was ultimately enacted as Section 14(b) of the Taft-Hartley Act employed language which on its face is more restrictive than that actually used. H.R. 3020, the version of the bill introduced by Congressman Hartley, permitted union shop agreements "* * * if * * * not in conflict with the law of any State in which the agreement is *to be carried out*." (emphasis added) See 1 Leg. Hist. LMRA 183-84. The accompanying House Report stated that under this provision such agreements would be valid "only if they are valid under the laws of any state in which they are *to be performed*." (emphasis added) H.R. Rep. No. 245, 80th Cong., 1st Sess. at 34, 1 Leg. Hist. LMRA 294-406 at 325. Also, this Court has held that "* * * Congress * * * give[s] the right of way to state laws barring the execution and *enforcement* of union-security agreements." *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (emphasis added).

period. Moreover, for the entire duration of their employment, employees covered by such agreements are subject to discharge should they refuse to continue to make required payments to the union.[19]

Thus, the "execution or application" of agreements covered by Section 14(b) is not limited to a particular time, place or event. Rather, since such agreements are applied both with respect to and throughout the employment relationship, the test for sufficiency of a state's interest as to application of its right-to-work law to such relationship must necessarily concentrate on the whole of such relationship. The language chosen by Congress specifically recognizes the necessity to examine the entire employment relationship. Congress did not look solely to the place of hiring or termination or where the job was performed; instead, with the knowledge that agreements of the sort covered by Section 14(b) are significant from the time of hire to termination of employment, Congress specified that the law of the state where such agreements are to be executed or applied — that is, where the employment relationship is centered — will control.

2. The legislative history of Section 14(b).

The legislative history underlying Section 14(b) supports this interpretation. It manifests Congress' intent that a state's interest in applying its policy is to be determined by looking to the entire employment relationship.

Clearly, a principal concern of Congress was with hiring, and, as a corollary, discharges of employees who at any time after hire refuse to abide by agreements within the scope of Section 14(b). The problem of compulsory union membership was one of the major issues confronting Congress at the time of the enactment of Sections 8(a)(3) and 14(b). The Senate Report noted that "mature deliberation"

[19] Federal courts have generally recognized that union security devices in a labor contract are presumptively coercive in that employees subject to these devices are compelled to comply or otherwise suffer the consequences. See *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F. 2d 1107 (9th Cir. 1975).

had been given to the problem and that the "solution" embodied in those sections resulted from accommodation of employer and employee interest in unrestricted employment and union interest in sharing the costs of collective representation. S. Rep. 105 at 5-6, 1 Leg. Hist. LMRA at 411-412. Congress discussed at length the abuses of compulsory unionism and noted that these problems were especially severe in the maritime industry:

> It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. (S. Rep. 105 at 6, 1 Leg. Hist. LMRA at 412.)

The legislative history of Section 14(b) is replete with similar references to the perceived impact of compulsory unionism on the hiring process,[20] and thus demonstrates that in enacting Sections 8(a)(3) and 14(b) Congress sought to alleviate such consequences.

However, the legislative history of Section 14(b) also demonstrates that the concern of Congress with compulsory unionism was not limited solely to its effects on

[20] See e.g., H.R. Rep. No. 245 at 4, 1 Leg. Hist. LMRA 295:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will * * * He has been denied any voice in arranging the terms of his own employment. * * *

hiring. Rather, Congress recognized that a contract provision requiring compulsory union membership affected the whole employment relationship. Indeed, Congress specifically noted that the impact of a union security provision did not cease after hire and frequently resulted in termination. The Senate Report states:

> Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpenaed to appear in Court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract.
>
> Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. (S. Rep. No. 105 at 6, 7; 1 Leg. Hist. LMRA 412, 413.)

Congress thus evidenced its concern with the continued impact of union security clauses on employees subsequent to hire. The legislative history of Sections 14(b) and 8(a)(3) makes plain, then, that the focus of Congress' concern was on the effects of union security provisions on the entire employment relationship.

C. Texas has a sufficient interest in applying its right-to-work law to the employment relationship in this case.

As the district court and the court of appeals sitting *en banc* found in light of the language and legislative history of Section 14(b), Texas plainly has sufficient interest in the application of its right-to-work law to the employment relationship in this case. Examination of the substantial contacts this employment relationship has with Texas (set out

at length in the Statement portion of this brief, pp. 3-7 *supra*) demonstrates that *all* of the crucial aspects of such employment relationship occur in Texas.

All final hiring *and* firing decisions are made in Texas, and 60 percent of all employment applications are submitted in Texas. All of Respondent's personnel are supervised in and from Texas, and all personnel records are maintained in Texas.

All payroll checks are written in and mailed from Texas. All monthly checkoffs of union dues are computed in Texas, deducted from wages in Texas, and mailed to the union from Texas. All cash paid employees aboard ship is placed on board in Texas. All federal withholding taxes are calculated in and remitted from Texas to an Internal Revenue Service office in Texas. Texas is the only state collecting unemployment compensation insurance premiums.

Of Respondent's 289 unlicensed employees, 152 of them have requested Respondent to list Beaumont, Texas, as their shipping port and 123 of them have reported to Respondent that Texas is their state of residence. No other state approaches this qualitative or quantitative level as to the workforce.

All of Respondent's seafaring employees are regularly present in the State of Texas. At all times throughout the administration of the Agreement many of these employees are physically within the State of Texas either on board tankers or on vacation/paid leave or on shore leave. Ten to 20 percent of the work time of these employees is spent within the State of Texas.[21]

On the basis of these undisputed facts, Texas clearly has a sufficient interest in the employment relationship between

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[21] While job situs is a factor in determining whether a state has a sufficient interest in the employment relationship under Section 14(b), it is not, as suggested by Petitioners and the Solicitor General, the only test. Further, as shown below at pp. 29-31 *infra*, if the Solicitor General's formulation of the job situs test is accepted, Texas law applies because he has misstated the facts of this case.

Respondent and its seafaring employees to apply the Texas right-to-work law. Indeed, it is not contended in this Court, nor was it contended in the courts below, that any state other than Texas has an interest in this employment relationship sufficient to justify application of its law to this employment relationship. In fact, as acknowledged by Petitioners, the very Agreement which governs this employment relationship is administered within the State of Texas on a daily, recurring basis. And, without doubt the agency shop clause as a part of such Agreement would also be *administered and applied in Texas* if an employee of Respondent were to be discharged for refusal to pay the union dues in lieu of membership.[22]

II. Exclusive reliance on job situs as proposed by Petitioners and the Solicitor General would result in the judicial creation of an exception to Section 14(b) and is not supported by any relevant authority.

The majority of the 3 judge panel of the court of appeals, and the dissenters on rehearing *en banc*, determined that "* * * the job situs of the employees is the most important and logical factor" (Pet. App. B, p. 12b). Petitioners and the Solicitor General urge in this Court that job situs is the only relevant factor. Thus Petitioners argue that "* * * the location where the work is done controls" (Pet. Br. p. 12). Similarly, the Solicitor General asserts that "[a] state has a sufficient interest in the employment relationship only if the employee performs some work within the state" (Sol. Gen. Br. 15).

While job situs is a factor in the determination of the sufficiency of any Texas interest in this employment relationship, it cannot alone be controlling. To make it conclusive

[22] For instance, a discharge for non-payment of union dues would have to be ordered and actually carried out by Respondent at its headquarters in Texas, thus requiring the fleet manager to violate the law of the state where Mobil Oil Corporation has qualified to do business.

would result in judicial usurpation of the function of Congress. Moreover, adoption of such a test is not supported by any relevant authority.[23]

A. Adoption of the job situs test would result in judicial creation of an exception to Section 14(b).

Sections 8(a) (3) and 14(b), like the rest of the Act, contain no specific exemption for the maritime industry. The job situs test proposed by Petitioners and the Solicitor General would, however, result in the creation of such an exception and would give preferred status to the compulsory unionism scheme allowed by Section 8(a) (3) to the complete exclusion of any state right-to-work law allowed by Section 14(b). Nothing in Section 14(b) indicates that it was not to be applied to seafaring employees. When Congress intended to prevent the application of state right-to-work laws, it did so by explicit statutory language as evidenced by its treatment of railway and airline employees covered by

[23] Indeed, there is authority pointing in the opposite direction. The Interstate Maritime Reciprocal Arrangement, adopted by some 24 states (including Texas and New York) so as to integrate the coverage of unemployment insurance laws of the various states with respect to seafaring personnel, recognizes the ephemeral nature of the "job situs" of seamen. See CCH Unemp. Ins. Reports ¶ 1334 (1971). This Arrangement employs an approach whereby "[t]he jurisdiction of coverage in regard to maritime services rendered on a vessel * * * shall be that participating jurisdiction in which the employing unit maintains the operating office from which the operations of the vessel are *ordinarily and regularly supervised, managed, and controlled*" (emphasis added). In this case, it is unquestioned that the operations of Respondent's tankers are supervised, managed and controlled from its headquarters in Beaumont, Texas. As a result, under the Interstate Maritime Reciprocal Arrangement (regardless of so-called "job situs") all of the services rendered by Respondent's seamen are "deemed performed entirely within the jurisdiction of coverage" — that is, the State of Texas.

the Railway Labor Act.[24] Similarly, when Congress desired to exempt a specific industry from the operation of certain provisions of the Act, it did so expressly for the construction industry and the apparel and clothing industries.[25]

Contrary to the suggestion of Petitioners, judicial creation of an exception to Section 14(b) is not required by "the sovereign law making power [of] the United States" over the high seas (Pet. Br. 36). Even the Solicitor General does not agree with that concept and departs from alignment with Petitioners. As the Solicitor General correctly states:

> [T]he fact that seamen usually are governed by uniform and federal maritime law is not an argument against the application of state right-to-work laws to the maritime industry. We do not agree with the dissenting judges (Pet. App. 25a-27a) that all maritime employment is outside the scope of state power. * * * Section 14(b) expressly permits diversity of regulation concerning union security and contains no exemption for maritime workers in general * * *; nor would maritime commerce necessarily be disrupted or hindered by the application to different ships or employers of different union security rules. (Sol. Gen. Br. 14 n. 7; citations omitted.)

[24] See Section 2, Eleventh, 45 U.S.C. § 152(11)(1970), of the Railway Labor Act, which provides:

> Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted —
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class.

[25] See Section 8(e), 29 U.S.C. § 158(e) of the Act, which provides that except in certain instances involving the construction industry and the apparel and clothing industries, it is an unfair labor practice for any labor organization and any employer to enter into so-called hot cargo contracts or agreements whereby the employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

While the historical discussion in Petitioners' brief as to the preferred status of seamen is interesting, it is irrelevant in this context. The Form of Articles of Agreement for seamen, as prescribed by federal law, provides that "'* * * any other stipulations may be inserted to which the parties agree, and which are not contrary to law." Table A in Schedule following 46 U.S.C. § 713 (1970). Federal maritime law and usage go only a negligible distance in bestowing benefits on Respondent's employees compared to what has been obtained for them by their union representatives, Petitioners herein. Therefore, the employment terms and conditions of Respondent's seamen employees are contained in, and controlled by, the Agreement. This Agreement is a typical creature of Taft-Hartley, containing fifty printed pages comprised of 128 separately numbered paragraphs (Pl. Ex. 1, A. 279-329). The topics covered by this Agreement were hammered out at the bargaining table under the Taft-Hartley Act, and not under admiralty law. Of these 128 topics, a few examples are: discipline (A. 291), working hours (A. 306), seniority (A. 289), meal hours (A. 294), lockers (A. 293), bedding (A. 293), wages (A. 310), overtime rate (A. 312), drills (A. 314), tank and bilge cleaning (A. 316), illness (A. 321), holiday meals (A. 322), port overtime (A. 324), and scheduling of vacation-paid leave (A. 327). Paragraph 3 of this Agreement contains the union dues checkoff authorization letter addressed to Respondent at its Beaumont headquarters (A. 282-83), and paragraph 13 contains the grievance procedure which culminates at step 5 with presentation of a written complaint to Respondent's office in Beaumont (A. 286-87).

Thus, the wages, hours and working conditions of Respondent's employees are formulated and tightly controlled under a labor agreement that has been collectively bargained pursuant to the requirements of the Act. These lucrative benefits were obtained for the employees by the Petitioners which acted to take full advantage of all Taft-Hartley rights

afforded to these employees. Even the Petitioners' own status as bargaining representative for these employees is found on an NLRB certification issued under the Act. Yet now it is claimed that this Act does not apply in full measure to seamen, or to unions that represent seamen. Such result is illogical; it would confer all conceivable Taft-Hartley benefits on the seamen and their union while insulating them from the corresponding limitations and qualifications that attach to everybody else.

Moreover, the law applicable to maritime industry collective bargaining agreements negotiated under the Act is no different from that which is applied to agreements covering other employees. As the court stated recently in *Cady v. Twin Rivers Towing Co.*, 486 F.2d 1335, 1339 (3d Cir. 1973):

> We are not aware of any cases to support the proposition that seamen suing under collective bargaining agreements are accorded special rights. On the contrary, principles developed under Section 301(a) [of the Taft-Hartley Act] have been held to apply to seamen in ways no different from other workers.

Accord: *Suissa v. American Export Lines, Inc.*, 507 F. 2d 1343 (2d Cir. 1974).[26] Further, despite Petitioners' statement that "Congress has developed a vast, all-pervasive and detailed body of statutory law regulating the employer-employee relationship of blue water seamen" (Pet. Br. 33-34), as a practical matter the importance of many of these statutory protections has greatly diminished. For example, the small

[26] In its decision in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971), this Court recognized that seamen are accorded no special rights under collective bargaining agreements and that principles of interpretation, such as the requirement of exhaustion of contractual grievance procedures, *see, e.g. Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), developed under Section 301 of the Act, 29 U.S.C. § 185 (1970), are ordinarily to be applied. Only a narrow exception was carved out for cases in which Congress had created a concurrent statutory remedy. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), where this Court held that resort to arbitration under a non-discrimination clause of a collective bargaining agreement did not foreclose the grievant from asserting his rights under the concurrent statutory scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970 ed. Supp. II).

sum of $8.00 per day is normally the amount which a seaman is entitled to receive as maintenance and cure on account of disability due to injury or illness incurred in the service of a vessel. However, pursuant to noncontributory sickness and accident plans maintained by many employers in the maritime industry under collectively bargained labor agreements, seamen are enabled to receive daily disability payments which far exceed the small amounts available as maintenance and cure. *Thomas v. Humble Oil & Refining Co.*, 292 F. Supp. 260 (E.D. Va. 1968), aff'd 420 F. 2d 793 (4th Cir. 1970); *Haughton v. Blackships, Inc.*, 462 F. 2d 788 (5th Cir. 1972). Furthermore, despite the presence of certain federal statutes regulating the payment of wages to seamen [see, e.g., 46 U.S.C. §§ 591 et seq. (1970)], not only the amount but also the method and frequency of wage payment to Respondent's seafaring personnel is established in largest part by the terms of the Agreement between Petitioners and Respondent (Pl. Ex. 1, A. 279, 308-312, 326-328), all of which is fully explained to each seamen in clear and easily understandable language upon employment with Respondent (Pl. Ex. 4, A. 242, 248-250).[27]

Accordingly, there is absolutely no basis for Petitioners' argument that the nature of admiralty jurisdiction requires that a special exception be carved out from the rule embodied by Congress in Section 14(b).[28]

[27] Although Petitioners have spoken in general terms as to the presupposed exalted status of seamen under federal law, it must be recalled that Respondent's operations are dissimilar to those of other employers in the maritime industry. In most instances a maritime employee will ship out of many different hiring halls and sail aboard the vessels of many different companies. See *NLRB v. Seafarers International Union*, 496 F. 2d 1363 (5th Cir. 1974). However, Respondent's personnel are not employed through hiring halls. Instead, as recognized in the Agreement between Respondent and Petitioners, Respondent employs a permanent workforce of seamen who are encouraged to remain in the continuous hire of Respondent until retirement age (Pl. Ex. 1, A. 279, 289). This absence of comparability of Respondent's operations to those of other employers also underscores the limited potential for application of the decision of the *en banc* court to other employment relationships.

[28] The authorities relied upon by Petitioners to establish that seamen are exempt from the application of state law under Section 14(b) are inapposite. *Union Fish Co. v. Erickson*, 248 U.S.

Petitioners also argue that in failing to adopt a right-to-work law applicable to the District of Columbia, Congress has indicated its intention that Section 8(a)(3) is to constitute the only limitation on union security agreements in all geographic areas over which Congress has primary legislative authority. This argument is likewise unpersuasive. This Court has held that Congress sits as a state legislature with regard to the District of Columbia and "* * * may * * * exercise all the police regulatory powers which a state legislature * * * would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973). In such role as a "state" legislature, Congress simply has chosen not to enact a right-to-work law for the District of Columbia. Hence, the failure of Congress to do so in no way indicates that the maritime industry is to be exempted from Section 14(b).

B. Exclusive use of the job situs test is not supported by the relevant authorities.

Both Petitioners and the Solicitor General have placed substantial reliance on 3 decisions of the NLRB rendered shortly after the enactment of Section 14(b).[29] The relevance of these cases is open to question. "The issue * * * was not whether some state law applied to the employment relationship but *which* state law applied, thus aborting the question with which we are now faced." (Pet. App. A, p. 5 n. 5; emphasis in original). A close examination of these decisions reveals that they do not support the job situs test proposed.

308 (1919), and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), unlike this case, did not involve an express authorization of the application of state law by Congress, and did not even involve the Taft-Hartley Act. Furthermore, *Union Fish* was decided some 16 years prior to enactment of the National Labor Relations Act, while *Kossick* was concerned only with the validity of an oral agreement unregulated by federal statute and did not involve a union or a collectively bargained labor agreement. Moreover, substantial disuniformity would have resulted from the application of state law in those cases.

[29] *Giant Food Shopping Center, Inc.*, 77 NLRB 791 (1948); *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948); *Western Electric Co.*, 84 NLRB 1019 (1949).

Indeed, they support reference to the entire employment relationship in determining whether state law is applicable under Section 14(b).

In those decisions, the NLRB dealt with the scope of the units in which elections were to be held under since repealed Section 9(e) of the Act,[30] 65 Stat. 601, 29 U.S.C. § 159(e) (1947), to determine whether employees desired to be covered by union security clauses. In the first case, *Giant Food Shopping Center, Inc.*, 77 NLRB 791 (1948), the NLRB affirmed its Regional Director's determination that in light of Section 14(b), such a unit could not properly include both employees employed in a right-to-work state and employees in a non-right-to-work state. However, the NLRB did not discuss at all the factors that might be considered in determining which state laws applied.

In *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948), the employees involved included bus drivers and other employees who continually traveled between various states with right-to-work laws and states without such laws. In determining which employees were covered by right-to-work legislation under Section 14(b), the NLRB stated:

> In resolving the question as to the applicable State law, such factors as the residences of the employees, the places where they were hired, their headquarters, the proportions of working time spent in the various States, and (with regard to the drivers), their routes, have been given consideration. In view of all the circumstances involved, we are persuaded that the headquarters of the employees provide the best criteria because they represent *the focal points of the employment relationship.* The headquarters are where the employees report to work, receive their instructions, and are paid their salaries. It is, therefore, in the States in which they have their headquarters that the provisions of any agreement

[30] Former Section 9(e) of the Act, which was repealed in 1951, established procedures for the holding of elections among bargaining unit employees to authorize the execution or rescission of agreements requiring membership in labor organizations as a condition of employment.

> between a union and an employer regarding the employees involved will be effectuated. In view of the fact that most of the essential matters with respect to the employment relationship will be dealt with in the States where the employees have their headquarters, we believe that application of this test to determine which State law shall control will result in the least amount of extra-territorial effect being given to the laws of one State as against those of another. (citations omitted, emphasis added).

Thus the NLRB did not concentrate on job situs; rather, it looked to "the focal points of the entire employment relationship".

In the third case relied upon as support for the job situs test, *Western Electric Co.*, 84 NLRB 1019 (1949), the NLRB found, applying the test developed in *Northland Greyhound*, supra, that installation employees who frequently moved from state to state were properly excluded from the Section 9(e) unit if their job site was in a right-to-work state. The NLRB noted that, as with the headquarters in *Northland Greyhound*, the job site was where employees "* * * report for work, receive their instructions, and are paid their wages" (84 NLRB at 1022).

In none of the cases relied upon by Petitioners and the Solicitor General as support for a "job situs" test did the NLRB hold that job situs was determinative under Section 14(b). The NLRB in fact, employed an approach much like that urged by Respondent here — that is, an approach which looks to all aspects of the employment relationship. Only where an examination of various aspects of the employment relationship showed it to be completely focused at the job site was job situs deemed controlling. And on the basis of the uncontroverted record evidence in this proceeding which demonstrates that a substantial number of focal points of the employment relationship between Respondent and its seafaring employees are centered in Texas, the *en banc* court correctly concluded under the NLRB approach that Texas right-to-work law applied to such relationship.

C. Under the job situs test of the Solicitor General, Texas law applies.

The Solicitor General argues that a "State has a sufficient interest in the employment relationship only if the employee performs some work within the State" (Sol. Gen. Br. 15). In his brief the Solicitor further asserts that:

> A union security clause could be "performed" only where the work is done or where the dues are collected and sent to the union. *Here, all of these events take place outside Texas. The work is performed at sea; the dues are deducted from wages paid at sea;* the dues are mailed to the Union in New York. (Sol. Gen. Br. 18; erroneous statements emphasized)

Even accepting a simplistic "place of work and place of pay" test as valid, the Solicitor General has misstated the facts of this case as to both elements. The uncontradicted record evidence in this case demonstrates that (despite the Solicitor General's statement that all work is performed outside of Texas) *Respondent's employees do perform — in the Solicitor General's words — "some" work in the State of Texas.* The district court made specific findings of fact that (1) *all* of Respondent's seafaring employees are "regularly present in the State of Texas inasmuch as [Respondent's] tankers are on voyages beginning or ending at Texas ports in their normal trade" (Finding of Fact No. 18, A. 28), (2) at *all* times some of Respondent's seafaring employees "are in the State of Texas, either on board tankers * * * or on paid vacation * * *" (Finding of Fact No. 19, A. 29), and (3) *all* of Respondent's seafaring employees spend 10% to 20% of their work time in Texas (Finding of Fact No. 18a, A. 36).[31]

[31] Finding of Fact No. 18a reads as follows:

> Substantially all of the employees' work time is spent aboard Plaintiff's tankers, and such vessels are located on the high seas or in ports other than ports located in the State of Texas approximately 80% to 90% of the time, but at any given point in time one of the vessels generally is located in Texas or Texas waters (A. 36).

The uncontroverted record evidence also shows that all payroll checks are written in and mailed from Texas (A. 65-69; Pet. App. A, p. 3) and that all monthly union dues checkoffs, federal withholding taxes, and federal social security taxes are deducted from those checks in Texas (A. 68, 158-161; Pet. App. D, p. 3). Unemployment compensation premium payments are also made to the State of Texas. Additionally, all cash given Respondent's employees aboard ship is put on board in Texas (Pet. App. D, p. 3). While Respondent's employees receive this cash (totaling in a representative year $1,[illegible]7,000.00) outside Texas, *paychecks* (amounting in that same year to $3,265,000.00) were prepared and mailed in Texas (Pl. Ex. 3, A. 238). Another $1,431,000.00 in federal income and social security taxes was deducted from the unlicensed employees' gross pay in Texas and paid to the federal government in Texas (*id.*). Thus, the Solicitor General has also misstated the facts of this case with regard to payments of wages.

While the Solicitor General has recognized the importance of the place where deduction of union dues is made, the emphasis both he and Petitioners place on job situs is difficult to fathom.[32] An agency shop clause is applied equally on hire, on deduction of union fees and dues from wages paid, and on termination for failure to make the required payments. It is those aspects of the employment relationship with which state policy is concerned, and those aspects should be determinative in assessing the sufficiency of a state's interest in applying its right-to-work law. The uncontroverted record evidence in this case

[32] Equally perplexing is the Solicitor General's suggestion (Sol. Gen. Br. 22) that because Section 14(b) fails to allow states to ban hiring halls, Congress was unconcerned with hiring in enacting Section 14(b). Only nondiscriminatory hiring halls — that is, halls that do not require union membership as a condition to use of the hall by employees or as a condition of hire by employers — are legal under the Act. *See Nassau-Suffolk Chapter of the National Electrical Contractors' Ass'n, Inc.*, 215 NLRB No. 125 (1975); *Teamsters & Truck Drivers Local No. 631*, 213 NLRB No. 91 (1974). Such halls simply do not have the same restrictive effect on the hiring process that Congress was concerned with in Sections 8(a)(3) and 14(b) and thus are not within the scope of those sections. See *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961) (remarks of Sen. Taft at 673-74).

shows that all of these events — hiring, payment of wages with deduction of union dues, and discharge — take place entirely in Texas (hiring, dues, and discharge) or predominantly in Texas (payment of wages).

Nonetheless, if the Solicitor General's own test (i.e., a state may apply its right-to-work law only if employees perform "some work" within that state), is applied to the undisputed record evidence in this case, Texas law controls; despite his misapprehension of the record, not only "some" work but indeed a *significant* amount of work is performed in Texas.

III. The test of the court of appeals will not result in extraterritorial application of Texas law, uncertainty or manipulation.

Application of Texas right to work law to the employment relationship between Respondent and its seafaring employees deprives no other state of its sovereign prerogative to apply its own law if it has a sufficient interest, that is, a predominant interest, in doing so.[33] Such a case is not now before this Court. No other contestant state has appeared, or indeed could appear under the facts of *this* particular employment relationship. The very term "extraterritoriality" is a misnomer under the unique blending of federal law in Section 14(b) and state right-to-work law. Federal law has prevailed, not state law, when it is considered that the trial court judgment expunging the agency shop clause from the Agreement was clearly an effectuation of national labor policy which has incorporated, adopted and thereby become as one with state policy in the right-to-work states.

[33] Despite the Solicitor General's professed concern (Sol. Gen. Br. 17) that application of Texas right-to-work law to this employment relationship gives extraterritorial effect to Texas law, he does nevertheless concede that crews of tugboats and ships on intrastate waterways in Texas would remain covered by Texas law even if their employment took them to other states (Sol. Gen. Br. 13-14). Moreover, the method of analysis chosen by the *en banc* court to look to the whole of the employment relationship is neutral for it does not prefer the law of any state. Rather, the law of the state with a sufficient interest in the employment relationship will be applied — regardless of whether it is one with or without a right-to-work law.

Looking to the entire employment relationship will not, in the ordinary case, produce uncertainty concerning which state's law is to be applied. Except in the rare case, there will be little doubt about which state is at the center of the employment relationship. And in those cases where some doubt exists, it is not reduced by use of the job situs test advocated by Petitioners and the Solicitor General. Under the job situs test, there would, for example, be no certain result where employees are hired in one state, work in a second state, and union dues are deducted from checks made out and mailed from a third state. Moreover, contrary to the implications of Petitioners and the Solicitor General, the court of appeals did not hold that some state's law must always be applicable to an employment relationship. In a case like that posited above, if other aspects of the employment relationship were similarly dispersed, it might be concluded by a court that no state had an interest in the employment relationship sufficient to justify application of its law.

Finally, the suggestion that the approach of the *en banc* court will be subject to manipulation does not withstand even cursory scrutiny. The court of appeals *en banc* noted that Petitioners have never alleged that Respondent moved to Texas on account of the Texas right-to-work law (Pet. App. A, p. 17). A union security clause involves no cost to the employer; the costs, in the form of union fees and dues, are borne by his employees. Moreover, it strains credulity to suggest that the existence of a state's right to work law would be the determining factor in the face of such weighty considerations as, for example, local taxes, availability of work force, source of raw materials, logistics, central control of operations, and distance from relevant markets. Furthermore, were an employer to relocate in order to escape an incumbent union or a union that has requested recognition, it would have committed an unfair labor practice subject to NLRB sanctions.[34] In light of these factors, the contention that the test developed by the *en banc* court and advocated by Respondent would lend itself to employer manipulation, plainly lacks merit.

[34] See, e.g. *Royal Norton Mfg. Co.*, 189 NLRB No. 71 (1971).

CONCLUSION

Both the language of Section 14(b) and the relevant legislative history mandate that the sufficiency of a state's interest in applying its law be determined by looking to the whole employment relationship. On the undisputed facts of this case and even under the test proposed by the Solicitor General, Texas clearly has a sufficient interest in applying its right-to-work law to this employment relationship.

Weighing the whole employment relationship will not result in uncertainty, manipulation or an unwarranted extra-territorial application of state law. Such a comprehensive test is fair, neutral and logical. In contrast, judging the sufficiency of a state's interest in applying its right-to-work law solely by job situs would result in judicial legislation of an exception to Section 14(b). Further, looking solely to job situs is without support in the authorities.

Accordingly, the trial court judgment and court of appeals *en banc* judgment are correct and should be affirmed.

Respectfully submitted,

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